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82-1609

No.

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT L. LONG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF O'CONNELL & HULSLANDER
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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS APPLICATION OF A STRICTER STANDARD FOR REVIEWING SUFFICIENCY OF EVIDENCE IN CRIMINAL CASES WHICH DEPARTS FROM AND OVERRULES, IN PART, GOVERNING LAW, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
LIST OF PARTIES	iv
PREFACE	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
COURT RULES AND INTERNAL PROCEDURES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	13

TABLE OF CITATIONS

UNITED STATES CASES	PAGE
United States v. Bell, 649 F.2d 281, 284, rehearing en banc granted, 678 F.2d 547, 550 (5th Cir. 1981)	9,10,11
Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981)	7, 8, 9, 12
United States v. Marx, 635 F.2d 436, 438 (5th Cir. 1981)	13
United States v. Martin Howard Pett, Case No. 81-5267, United States Court of Appeal, Eleventh Circuit, opinion filed April 21, 1982	2,6,10
United States v. Pierre, 688 F.2d 724 (11th Cir. 1982)	10
United States v. Rodriguez, 654 F.2d 315, 317 (5th Cir. 1981)	9

OTHER AUTHORITIES	
U. S. CONST. amend V.	3
U. S. CONST. amend XIV.	3,4
28 U. S. C., Section 1254(1).	2
Sup. Ct. R. 17.1(a)	4,8,12
11th Cir. R. 25	4,5,8
Internal Operating Procedures, United States Court of Appeals for the Eleventh Circuit, V(B)(3)	4

LIST OF PARTIES

The Petitioner, ROBERT L. LONG, and the Respondent, UNITED STATES OF AMERICA, are the only parties to this action.

PREFACE

The Petitioner was the Defendant in the federal trial court below. The United States of America was the prosecution below. In this petition, the parties will be referred to as Petitioner and Respondent, respectively.

The following reference is made in this petition: (A) For the appendix to the petition of the petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT L. LONG,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter of February 8, 1983. Alternatively, Petitioner requests this Honorable Court to remand this cause to the Court of Appeals for rehearing and clarification of its per curiam judgment.

OPINIONS BELOW

The February 8, 1983 per curiam opinion of the Court of Appeals whose judgment is herein sought to be reviewed is reprinted in the Appendix to this Petition, (A) Page 4 . The April 21, 1982 opinion of the same court in the case of United States of America v. Martin Howard Pett, Case No. 81-5267, is relevant to this Petition and is appended at (A) Page 14 .

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1983. A timely Motion for Rehearing was filed by Petitioner on February 28, 1983 and no ruling has yet been made on the motion. On March 8, 1983, the Honorable Judge Henderson entered an Order Staying Issuance of the Mandate from the Court of Appeals and extending the time for the filing of this Petition to and including April 1, 1983. The jursidiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

U. S. CONST. amend. XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

COURT RULES AND INTERNAL PROCEDURES INVOLVED

Sup. Ct. R. 17.1(a). See (A) page 2.

11th Cir. R. 25. See (A) page 1.

Internal Operating Procedures, United States Court of Appeals for the Eleventh Circuit, V(B)(3). See (A) page 3.

STATEMENT OF THE CASE

Petitioner, ROBERT L. LONG, was charged by indictment in the United States District Court for the Middle District of Florida with Conspiracy to Defraud the Federal Government. Petitioner was tried October 29, 1981 through November 2, 1981. He was convicted and a sentence of eighteen months incarceration was imposed on November 18, 1981. Timely appeal

to the United States Court of Appeals for the Eleventh Circuit ensued thereafter. Oral arguments were heard on December 6, 1982. The Court's per curiam affirmance followed on February 8, 1983.

The case against the Petitioner at trial was wholly circumstantial and one of the points he preserved on appeal was the insufficiency of the evidence for conviction on the conspiracy charge.

In affirming, the Eleventh Circuit Court of Appeals cited to 11th Cir.R. 25, (A) page 1. Subsection (b) of that rule provides:

> That the evidence in support of the jury verdict was not insufficient.

After the Court's per curiam affirmance was returned on February 8, 1983, counsel for Petitioner learned of a previous announcement by the Honorable, then Chief Judge Godbold, that the United States Court of Appeals for the

Eleventh Circuit had adopted a standard for review of the sufficiency of evidence in criminal cases which Judge Godbold described as different and stricter than the former "circumstantial evidence test" of the United States Court of Appeals for the Fifth Circuit. This information was apparently imparted by Judge Godbold to appellate counsel in February, 1981 during oral argument in the separate and unrelated case of United States of America v. Martin Howard Pett, Case No. 81-5267, United States Court of Appeals, Eleventh Circuit. The Court affirmed per curiam in that case, (A) page 14, and denied Appellant's Motion for En Banc Rehearing, (A) page 30 .

The brief history of this unrelated case was subsequently related to counsel for Petitioner herein after February 8, 1983, the date on which the per curiam opinion in this cause was rendered. This new information was incorporated into Petitioner's Motion for Re-

hearing, (A) page 10, and into his Motion for Stay of Issuance of Mandate, (A) page 5. Although the Motion for Stay was granted until April 1, 1983, (A) page 8, a ruling upon the Motion for Rehearing is apparently still pending. Counsel has not received any ruling on that motion as of the date of the filing of this Petition.

The application of a stricter standard by the Eleventh Circuit Court of Appeals in the instant case would be in contravention of its own announcement in Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981), to follow the precedent of the United States Court of Appeals for the Fifth Circuit. Such application would not only conflict with the precedent of the United States Court of Appeals for the Fifth Circuit, but would also represent such a "departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of

supervision." Sup. Ct. R. 17.1(a), (A) page 2.

REASONS FOR GRANTING THE WRIT

The policy of the United States Court of Appeals for the Eleventh Circuit with regard to the publication of opinions is stated in pertinent part as follows:

> "It is declared to be the basic policy of this Court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions." Internal Operating Procedures, V(B)(3).

The Court of Appeals does not publish opinions which it believes to have no precedencial value, but makes general reference to its own Rule 25. See 11th Cir.R. 25, (A) page 1.

Shortly after its creation, the United States Court of Appeals for the Eleventh Circuit specifically adopted the precedent of the United States Court of Appeals for the Fifth Circuit as binding upon it. Bonner v.

City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981). The standard for judging the sufficiency of evidence in circumstantial cases relied upon at the trial court and on appeal in the case sub judice is historically and unanimously expressed as follows:

> "If the jury could not reasonably conclude that the evidence fails to exclude every reasonable hypothesis but that of guilt, then (the reviewing court) must reverse the conviction." United States v. Rodriguez, 654 F.2d 315, 317 (5th Cir. 1981)."

Occasionally a slight variation appears:

> "In criminal cases based on circumstantial evidence (the review in court's) task is to determine whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence." United States v. Bell, 649 F.2d 281, 284, rehearing en banc granted (5th Cir. 1981).

The United States Circuit Court of Appeals for the Eleventh Circuit is, therefore, duty bound to recognize former Fifth Circuit case law as governing precedent, and, as an absolute

rule, this precedent cannot be overruled except by the Court sitting en banc. To date, no such en banc change in this standard has been effected by the Eleventh Circuit Court of Appeals, although rehearing was denied on this very issue in the case of United States of America v. Pett, Case No. 81-5267, (A) page 30.

The opinions for the United States Court of Appeals for the Eleventh Circuit continue to refer to the en banc decision of the Fifth Circuit in Bell, supra, when the standard of reviewing the sufficiency of evidence in circumstantial cases is at issue. See, e.g., United States v. Pierre, 688 F.2d 724 (11th Cir. 1982). A closer examination of the concurring opinion on rehearing in the Bell case reveals a possible source of the confusion:

> "To say that the evidence is sufficient if 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt,' is not substantively different from saying that the

> evidence is sufficient if a reasonable trier of fact could find that the 'evidence was inconsistent with every reasonable hypothesis of innocence'. United States v. Bell, 649 F.2d 281, rehearing en banc granted, 678 F.2d 547, 550 (5th Cir. 1982).

Such ambiguity in Fifth Circuit dictum, particularly as applied to the development of an evolving body of case law for a new court of appeals, is fraught with great potential misunderstanding by both the judiciary and the trial bar.

It is clear that without a written opinion from the Court of Appeals in the instant case, there is no way to know what standard was actually applied by that court in passing on the issue of the sufficiency of the circumstantial evidence for Petitioner's conviction.

If there is a standard such as Judge Godbold announced which is stricter than that followed by the Court of Appeals for the Fifth Circuit, it may have been applied by some of

the three judge panels of the United States Court of Appeals for the Eleventh Circuit and not by others. At a minimum, there should be an exercise of this Court's supervisory authority by way of certiorari to inquire into the existence of the potential duality of review within the Court of Appeals itself. Sup. Ct. R. 17.1(a), (A) page 2 .

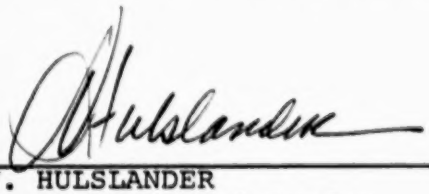
Assuming, arguendo, that as per Judge Godbold, a stricter standard of review was in effect and applied in the instant case with regard to circumstantial evidence, the Petitioner, who has relied on Fifth Circuit precedent both at trial and on appeal, has had a different and more strict standard applied to his case. This would be violative of the dictates of Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981) as well as of the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner is denied the due process of law which the Court of Appeals itself has mandated in Bonner,

supra, and he is denied the equal protection of that less strict standard which the Fifth Circuit and other circuits have traditionally applied. See, e.g., United States v. Marx, 635 F.2d 436, 438 (5th Cir. 1981).

CONCLUSION

This Honorable Court should exercise its discretion and grant the writ of certiorari as an exercise of its supervisory power over the lower appellate courts. It should require clarification by way of written opinion of the standard employed for review of sufficiency of circumstantial evidence in criminal cases arising within the United States Court of Appeals for the Eleventh Circuit and, if such standard is different than that which is required by precedent, it should remand this cause to the lower appellate court for reconsideration consistent with the applicable standard.

Respectfully submitted, this 29th day of March, 1983.



V. HULSLANDER
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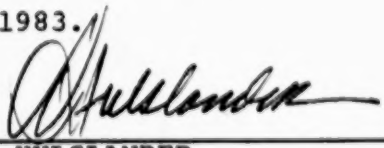
(904) 373-9141
Counsel for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to DONALD E. CHRISTOPHER, Assistant United States Attorney, 501 Federal Building, 80 North Highey Avenue, Orlando, Florida, 32801, by U. S. Mail, this 29th day of March, 1983.



V. HULSLANDER

APPENDIX A

11th Cir. R. 25. Affirmance Without Opinion.

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is not insufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Sup. Ct. R. 17. Considerations governing review on certiorari.

.1. A review on writ of certiorari is not a matter or right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Internal Operating Procedures, United States Court of Appeals for the Eleventh Circuit, Rule V(B)(3). Publication of Opinions - The policy of the court, as stated in the Eleventh Circuit's Opinions Publication Plan, provides that "The unlimited proliferation of published opinions is undesirable because it tends to impair the development of a cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality."

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6174

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROBERT L. LONG, Defendant-Appellant.

Appeal from the United States District Court

for the Middle District of Florida

February 8, 1983

Before HENDERSON and HATCHETT, Circuit Judges,

and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee,

vs. CASE NO: 81-6174

ROBERT L. LONG, Defendant/Appellant.

MOTION FOR STAY OF ISSUANCE OF MANDATE PENDING APPLICATION FOR CERTIORARI

Defendant/Appellant, ROBERT L. LONG, respectfully moves this Court pursuant to F.R.A.P. 41(b) to stay the issuance of any mandate in this case pending his application to the United States Supreme Court for Writ of Certiorari. Grounds:

1. On February 8, 1983, the United States Court of Appeals for the Eleventh Circuit issued its per curiam affirmance of the judgment and sentence of the Defendant, which called for his incarceration for a period of eighteen months.

2. The Defendant/Appellant has simultaneously filed with this Motion a Petition for Rehearing of the Court's affirmance of his conviction.

3. If rehearing is denied in his case, the Defendant/Appellant will file his application to the United States Supreme Court for a Writ of Certiorari.

4. As indicated in the Petition for Rehearing, it is the Defendant/Appellant's belief that the Court misapplied or overlooked two important areas of precedent which were made binding upon it by the decision in Bonner v. City of Pritchard, Alabama, 661 F.2d 1206, 1207 (5th Cir. 1981) (en banc). Specifically, the Court misapplied the standard of review for sufficiency of evidence in criminal cases and the rule relating to the introduction of extrinsic evidence of prior bad acts in a criminal case.

5. The Defendant/Appellant respectfully submits that these points are substantial questions of law which should be resolved by the Supreme Court, that they are not frivolous, not filed merely for delay and that they set forth good cause for a stay.

WHEREFORE, the Defendant/Appellant, ROBERT L. LONG, respectfully requests this Court to issue a stay for at least thirty days during which time he may pursue his application for Writ of Certiorari in the United States Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to DONALD E. CHRISTOPHER, ESQUIRE, Assistant U. S. Attorney, Room 501, U. S. Courthouse, 80 North Hughey Avenue, Orlando, Florida, 32801.

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Attorney for Defendant/
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6174

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ROBERT L. LONG, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida.

O R D E R :

The motion of appellant, Robert L. Long, for stay and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 1, 83, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the

expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

UNITED STATES CIRCUIT JUDGE
ALBERT J. HENDERSON, JR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs. CASE NO. 81-6174

ROVERT L. LONG,

Defendant/Appellant.

_____/

PETITION FOR REHEARING
BY ORIGINAL PANEL

Defendant, ROBERT L. LONG, through undersigned counsel, respectfully petitions this Court for its Order allowing for rehearing of particular points of law which in the opinion of the petitioner the Court has either overlooked or misaprehended. This motion is filed pursuant to F.R.A.P. 40.

1. On February 8, 1983, the United States Court of Appeals for the Eleventh Circuit in a per curiam decision without an opinion affirmed the conviction of the defendant/appellant, ROBERT L. LONG.

2. Circuit Rule 25 was cited as a refer-

ence in the Court's affirmance; referring to that rule, it is clear that the Court determined:

> a. That the judgment of the District Court was based on findings of fact that are not clearly erroneous;
>
> b. That the evidence in support of the jury verdict was not insufficient. Subsections (c) and (d) do not seem to apply in this case.

3. Petitioner asserts that the Court in reaching this decision misapplied the standard of review as to the sufficiency of circumstantial evidence in a criminal case. By its decision in Bonner v. City of Pritchard, 661 F. 2d 1206, 1207 (5th Cir. 1981) (en banc), this Court made binding on it the precedent of the United States Court of Appeal for the Fifth Circuit. The standard of review used by this Court in judging circumstantial evidence and its sufficiency in criminal cases has been expressly different from the precedent enunciated in Fifth Circuit cases. Chief Judge Godbold has opined in oral argument before

other counsel that a different standard of review is employed in the Eleventh Circuit. This is in conflict with the precedent of the Fifth Circuit. See United States v. Cardona, 650 F.2d 54, 57 (5th Cir. 1981); United States v. Gonzales, 617 F.2d 104, 106 (5th Cir.) cert denied, 449 U.S. 868, 101 S.Ct. 202, 66 L.Ed. 2d 86 (1980).

4. Petitioner also asserts that the Court overlooked or misaprehended the confusing nature of the extrensic act evidence presented by Appellant in Point I in his initial brief. The failure of the Court to follow the dictates of the United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) cert. denied , 440 U.S. 920, 99 S. Ct. 1244, 69 L.Ed. 2d 472 (1979), also violates the Court's own decision to follow the Fifth Circuit precedent in the Bonner case. Petitioner suggests that the extrensic acts and the other matters flowing from those acts created unfair prejudice, confusion of the issues, and needless presenta-

tion of cumulative evidence. United States v. Guerrero, 650 F.2d 728, 733 (5th Cir. 1981).

WHEREFORE, the Petitioner, ROBERT L. LONG, respectfully requests this Court to enter its Order allowing for reargument of these two particular issues and to reconsider upon that rehearing its affirmance of the judgment and conviction of the defendant/appellant.

Respectfully submitted,

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Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to DONALD E. CHRISTOPHER, ESQUIRE, Assistant U. S. Attorney, Room 501, U. S. Courthouse, 80 North Hughey Avenue, Orlando, Florida, 32801

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5267

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN HOWARD PETT,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

April 21, 1982

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

Conviction of conspiracy to possess methaqualone with intent to distribute. We affirm.

Mades, Pett's alleged co-conspirator (and roommate), pleaded guilty and testified as a prosecution witness.

Pett says that his motion for judgment of acquittal should have been granted because there was insufficient evidence of his intent

to participate in a conspiracy, the missing element being evidence of an agreement between him and Mades to divide the profits of the sale. Following is evidence to be considered on this contention. Pett, Mades and a friend of Pett's had met several weeks before the sale, and the friend had discussed the interest of Bigelow (an informer) in buying drugs. Later Bigelow went to Pett's stereo store and discussed with Pett the purchase of drugs; Bigelow testified "we were talking 5,000." During the next two weeks Bigelow talked to Pett on the phone concerning drug purchases. Pett told Bigelow there would be no delivery unless he showed him [Pett] the money first. Later Bigelow told Pett that he had the money and was ready to take delivery. Pett responded that things would "get rolling" but that nothing should take place at his [Pett's] store.

Thereafter Pett told Mades that Bigelow was in town, told Mades to give Bigelow a call,

and told Mades where Bigelow could be reached. Mades called Bigelow. No agreement was reached. Bigelow called Pett and was told that Mades had just left and probably was on the way to see him [Bigelow]. Mades never showed up. Bigelow protested to Pett, and Pett told Bigelow to go awaken Mades. Bigelow founds Mades and between them the delivery, made later that day was set up. Mades testified that he expected to divide the proceeds with Pett but that they never specifically agreed to divide, and that he only assumed there would be a division.

There was also evidence of an extrinsic offense admitted under F.R.Ev. 404(b). The testimony concerned an agreement approximately one month earlier between Pett and Mades to sell quaaludes. The court did not err in admitting this evidence. The jury was entitled to infer from the prior course of dealing between Pett and Mades that it was not necessary for them to have, in the charged sale,

a written or specifically verbalized contract to divide profits.

With or without the evidence of the prior offense, the motion for judgment of acquittal was correctly denied. Indeed, if the jury accepted the testimony of Mades, as it was entitled to do, the evidence of Pett's participation in a conspiracy with intent to distribute is overwhelming.

AFFIRMED.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT*

UNITED STATES OF AMERICA,

Appellee/Respondent,

vs. CASE NO: 81-5267

MARTIN HOWARD PETT,

Appellant/Petitioner.
_____/

On Appeal from the District Court for the Northern District of Florida.

APPELLANT PETT'S PETITION FOR REHEARING AND SUGGESTION FOR EN BANC CONSIDERATION

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel's decision is contrary to the following

decisions and precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981)

United States v. Bell, 649 F.2d 281, reh. en banc granted, (5th Cir. 1981)

I, also, express a belief based upon a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: has the panel in the instant cause, by erroneously applying the stricter standard for reviewing sufficiency of the evidence--a standard described by the Honorable Chief Judge Godbold, during Oral Argument, as different and stricter than the former Fifth Circuit "circumstantial evidence test"--thereby departed from and overruled, in part, governing law without en banc consideration as mandated by Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981)?

LARRY G. TURNER

Attorney of Record for
(A)19 Appellant PETT

STATEMENT OF ISSUE ASSERTED TO MERIT EN BANC CONSIDERATION

THE PANEL ERRONEOUSLY APPLIED A STRICTER STANDARD FOR REVIEWING SUFFICIENCY OF THE EVIDENCE--A STANDARD DESCRIBED BY THE HONORABLE CHIEF JUDGE GODBOLD, DURING ORAL ARGUMENT, AS DIFFERENT AND STRICTER THAN THE FORMER FIFTH CIRCUIT "CIRCUMSTANTIAL EVIDENCE TEST"--WHICH DEPARTS FROM AND OVERRULES, IN PART, GOVERNING LAW WITHOUT EN BANC CONSIDERATION AS MANDATED BY BONNER VS. CITY OF PRICHARD, ALA., 661 F.2D 1206 (11th CIR. 1981).

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

An INDICTMENT, charging Appellant with possession with intent to distribute methaqualone and conspiracy to possess methaqualone with intent to distribute, was returned on 17 October 1980. [R. Vol. II, p. 1]. On 11 February 1981, Appellant was tried in the Northern District Court of Florida. At the

close of the Government's case, counsel for Appellant made an Ore Tenus Motion for Judgment of Acquittal. [R. Vol. II, pp. 151-73]. On that same day, the jury verdict was returned finding Appellant not guilty of the possession charge and guilty of the conspiracy charge. [R. Vol. II, p. 45]. Appellant filed another Motion for Judgment of Acquittal on 26 February 1981. [R. Vol. II, p. 48]. This was formally denied by the Court on 16 March 1981. [R. Vol. II, p. 52]. Appellant was adjudicated guilty and sentenced to five (5) years in the penitentiary. [R. Vol. II, p. 54].

Appellant filed a NOTICE OF APPEAL on 16 March 1981 [R. Vol. I, p. 56] and the time for filing Appellant's Initial Brief was extended by the Clerk of the Court, Fifth Circuit Court of Appeals, until 15 July 1981. Appellant's Initial and Reply Briefs were timely filed thereafter.

Oral Argument was made before Godbold, Chief Judge, Fay and Hill, Circuit Judges,

on 4 February 1982.

On 21 April 1982, a per curiam Opinion issued affirming the trial court's conviction of Appellant PETT.

STATEMENT OF FACTS

On 11 February 1981, Appellant was convicted of the conspiracy charge notwithstanding the jury finding him not guilty of the possession charge and despite the trial judge's characterization of the evidence as "wishy washy" outside of the presence of the jury.

An Appeal was taken to this Court, at that time the former Fifth Circuit, urging that the jury could not have reasonably concluded that the evidence negated every hypothesis of the Defendant's innocence. During Oral Argument, on 4 February 1982 before Godbold, Chief Judge, Fay and Hill, Circuit Judges, the Honorable Chief Judge Godbold announced that the former Fifth Circuit standard for reviewing sufficiency of the evidence relied upon by counsel for Appellant no longer applied: that

the "circumstantial evidence test"--formerly requiring reversal of conviction "if the jury could not reasonably conclude that the evidence failed to exclude every reasonable hypothesis that that of the defendant's guilt"--had been replaced by a different and stricter test.

Counsel for Appellant, embarrassed by his ignorance of this exceptionally important precedent-setting departure from the controlling law, apologized to the Court and abandoned that portion of his argument. As a practical matter, the heart had been carved out of Appellant's prayer to this Tribunal for relief.

On 21 April 1982, a per curiam Opinion issued affirming the trial court's conviction of Appellant PETT. No mention was made, in the Opinion, about the standard of review upon which the affirmance was founded.

The panel, by erroneously applying a stricter standard for reviewing sufficiency of the evidence which departs from and overrules, in part, governing law without en banc

consideration, has contravened the mandate of Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981).

ARGUMENT

MARTIN HOWARD PETT's appeal for relief to this Tribunal was virtually stripped of legal impact and significance by the instant panels' expressed refusal to acknowledge the well-settled standard for reviewing sufficiency of the evidence.

It is important to consider the nature of this appeal and the circumstances giving rise to it. Appellant challenged the sufficiency of the evidence adduced at trial--a challenge which exclusively focused on guilt or innocence in conspicious contradistinction to other types of challenges which must, of necessity, be blind to guilt. When an accused maintains his innocence, as in the case at bar, and on appeal pleads that the evidence failed to prove otherwise, our system of justice should offer a most discerning ear and in ad-

dition, a meaningful standard by which the reviewing court might examine the jury's decision. This is particularly appropriate in a case resulting in conviction and incarceration despite the trial judge's characterization of the evidence as "wishy-washy".

Yet, during Oral Argument before Godbold, Chief Judge, Fay and Hill, Circuit Judges, on 4 February 1982, counsel for Appellant PETT was advised that the particular standard for reviewing the sufficiency of the evidence, constituting the very cornerstone of Appellant's plea for relief, was no longer recognized by this Circuit. That standard relied upon by Appellant is historically and unanimously expressed in the following terms:

> "If the jury could not reasonably conclude that the evidence fails to exclude every reasonable hypothesis but that of guilt then [the reviewing court] must reverse the conviction."

United States v. Rodriguez, 654 F.2d 315, 317 (5th Cir. 1981). Occasionally a slight variation appears:

> "In criminal cases based on circumstantial evidence [the reviewing court's] task is to determine whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence."

United States v. Bell, 649 F.2d 284, rehearing en banc granted (5th Cir. 1981).

Yet, according to the instant panel, both expressions of that standard failed to survive a recent change in governing law by this Circuit and hence, were not recognized nor applied in this cause. And this holds true notwithstanding this Court's failure to follow its self-imposed mandate, enunciated in Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981)? That is, that this Circuit is duty-bound to recognize former Fifth Circuit case law as governing precedent and, as an absolute rule, prior decisions of this Circuit, as well as those of the Fifth Circuit, cannot be overruled by a panel but only by the Court sitting en banc.

This Court has never ruled upon this

issue under the auspices of an en banc review. And the very concept of justice would seem to demand that such an exceptionally important and precedent-setting revision of governing law must require the deliberation, wisdom and guidance of every justice in this Court. Stability and predictability are essential factors in the proper administration of justice. Only with the stability and predictability that adherence to the procedure outlined in Bonner gives can both citizens and legal advisors find assurance against the untoward surprise experienced in the case sub judice . Moreover, fairness in the system and public faith in our judiciary, as a source of impersonal and reasoned judgments, depend on orderly and predictable guidelines and strict adherence to them.

Upon being informed that Appellant relied upon dead law, counsel for Appellant, embarrassed by his ignorance of this exceptionally important precedent-setting departure from

controlling law, apologized to the Court and abandoned that portion of his argument. As a practical matter, the heart had been carved out of Appellant's prayer to this Tribunal for relief.

CONCLUSION

In conclusion, for the reasons urged in the body of this Petition, Appellant/Petitioner MARTIN HOWARD PETT prays that this Court review the recording of the dialogue between counsel and Court during Oral Argument on 4 February 1982, and enter its Order vacating the instant panel decision and grant a rehearing en banc.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR REHEARING AND SUGGESTION FOR EN BANC CONSIDERATION has been furnished by U.S. Mail to LYNDIA P. KENT, ESQUIRE, Assistant United States Attorney, Post Office Box 1308, Tallahassee, Florida, 32302, this 10th day of May, 1982.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-5267

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

MARTIN HOWARD PETT, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 21, 11 Cir., 1982, ___F.2d____).

June 8, 1982

Before GODBOLD, Chief Judge, HILL and FAY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED/and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rulte 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

UNITED STATES CIRCUIT JUDGE
JOHN C. GODBOLD

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